Factor Sales, Inc. *and* United Food and Commercial Workers Union, Local 99.[1] Case 28–RC–6290

July 31, 2006

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held March 11 and 12, 2005, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 109 for and 169 against the Petitioner, with 41 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in the light of the exceptions and briefs and, contrary to the hearing officer's recommendation, has decided to overrule the Petitioner's Objection 7, which alleged that "[t]he Employer prevented off-duty employees from talking to Union representatives," and to certify the results of the election.[2]

The hearing officer recommended sustaining Objection 7 and setting aside the election because he found that the Employer engaged in objectionable conduct by promulgating and enforcing an overly broad no-talking rule and by engaging in surveillance of its employees' concerted protected activity. We do not adopt the hearing officer's recommendation because we find that the allegation of Objection 7 differs materially from the hearing officer's basis for setting aside the election. The objection was that the Employer issued an improper directive to off-duty employees. The hearing officer set aside the election on the basis that the Employer had issued an improper directive to "on the clock" employees.[3] Further, the issue of surveillance, another ground for setting aside the election, was not alleged as an objection at all.[4] Because the Employer was not afforded due process, we will overrule Objection 7.[5]

Background

The hearing officer found that, at the conclusion of a captive audience meeting held at the Employer's offices about 2 weeks before the election, the Employer's labor consultant told 15–20 unit employees who were attending the meeting that union representatives were outside and that the employees were not to "stop to talk" to those representatives. After this meeting, four of the Employer's security guards accompanied the employees as they walked the several blocks back to the store. The hearing officer further found that the employees were "on the clock" during the meeting and the walk back to the store. The hearing officer concluded that, through its instruction at the meeting, the Employer promulgated an overly broad no-talking rule and that, by providing the escort of security guards, the Employer enforced this rule and engaged in surveillance of its employees' protected activities. Based on these findings, the hearing officer recommended that Objection 7 be sustained and a rerun election held.

In its exceptions, the Employer argues that it was deprived of due process because the objections set for hearing did not allege the conduct that the hearing officer found objectionable. The Employer observes that none of the Petitioner's objections alleged either that the Employer promulgated and enforced an overly broad no-talking rule or that it engaged in surveillance through its security guards. In particular, the Employer points out that Objection 7 referred to conduct affecting "off-duty" employees whereas the hearing officer found conduct affecting employees who were "on the clock."

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[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359 (1957). We find no basis for reversing the findings.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Petitioner's Objections 1, 2, 8, and 9. The Petitioner withdrew Objections 3, 4, 5, and 6 at the hearing.

[3] The Regional Director's Order Directing Hearing used identical language to describe the issue set for hearing under Objection 7.

[4] Contrary to the dissent, we do not find that "surveillance" was reasonably encompassed by Objection 7. That objection alleged *only* that the Employer issued an improper directive to off duty employees that they not talk to union representatives, and that was the precise allegation against which the Employer defended. The dissent begins with the allegation that the Employer prevented employees from talking to the Union. The dissent then says that this allegation encompasses the presence of a security guard. The dissent then goes on to say that the presence of the security guard encompasses surveillance of the employees. In short, the surveillance is two steps removed from the the original allegation. This chain of reasoning might have been correct if the Objecting Party had alleged it. The Objecting Party did not do so.

[5] Though Member Schaumber joins in finding a denial of due process, he is persuaded that a single instruction to an inexact but small number of employees that they should refrain from talking to union representatives during the brief period required to walk back to their duty stations was de minimis in nature and effect and could not reasonably have affected the outcome of this election, which the Petitioner lost by a vote of 169–109.

DISCUSSION

We agree that the Employer was denied due process because we find that the wording of Objection 7 failed to provide the "meaningful notice . . . and . . . full and fair opportunity to litigate" that are the fundamental requirements of procedural due process. *Lamar Advertising of Hartford*, 343 NLRB No. 40, slip op. at 5 (2004). To be "meaningful," the notice must provide a party with a "clear statement" of the accusation against it. Id. "It is axiomatic that a [party] cannot fully and fairly litigate a matter unless it knows what the accusation is." *Champion International Corp*., 339 NLRB 672, 673 (2003).

Here, the objection alleged misconduct affecting "off-duty" employees, leading the Employer reasonably to assume that the dispositive issue raised by the objection was whether the employees in question were on, or off, duty. The Employer's posthearing brief and the record of the hearing show that the only fact that the Employer sought to prove in order to defend its conduct at, and immediately after, the meeting was that the employees were on work hours.[6] Moreover, the hearing officer indicated that he considered the off-duty/on-the-clock distinction to be central to the case. He did this by conducting his own examination on the question. The hearing officer ultimately agreed with the Employer that the employees were "on the clock," but he then went on to find that the instruction was discriminatory and overly broad as directed to the "on the clock" employees. We need not pass on whether that instruction was indeed discriminatory and overly broad. Suffice it to say that this was not the basis for Objection 7.

In sum, the Petitioner failed to put the Employer on notice of the legal theory under which the consultant's instruction might be objectionable, thereby depriving the Employer of the opportunity to introduce evidence that might have rendered the instruction, under the totality of the circumstances, unobjectionable.[7] Not only did the wording of the objection and the course of the litigation fail to provide clear notice of the allegation, they also affirmatively misled the Employer into defending against a theory that was irrelevant to the true issues at stake.[8]

For these reasons, we overrule Objection 7. Because all of the Petitioner's objections have been either overruled or withdrawn, we shall issue a certification of results of election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for United Food and Commercial Workers Union, Local 99, and that it is not the exclusive representative of these bargaining unit employees.

Dated, Washington, D.C. July 31, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

The Board should sustain the Petitioner's Objection 7, which alleged that "[t]he Employer prevented off-duty employees from talking to Union representatives." My colleagues overrule the objection on the ground that by referring to "off-duty" rather than "on the clock" employees, the objection "differs materially" from the grounds on which the hearing officer set aside the election. They contend that this discrepancy prevented the Employer from putting on a relevant defense and therefore deprived it of due process. The majority ignores the fact that the Employer presented the relevant—albeit wholly discredited—defense that its actions were taken out of concern for employee safety. And my colleagues offer no indication of anything in the record or the briefs to suggest that the Employer had any other defense for

[6] The Employer also presented evidence of its concerns for employee safety in order to defend its providing the security guard escort. We reject our dissenting colleague's speculation that, because this evidence might also have provided legal justification for the instruction at the meeting, its presentation shows that the Employer was on notice that the instruction itself was at issue.

[7] It is axiomatic, of course, that the mere presence in the record of evidence relevant to an unstated accusation "does not mean the [defending] party . . . had notice that the issue was being litigated." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983).

The dissent faults us for not explaining what sort of mitigating evidence the Employer might have presented. That is the Employer's task, not ours. We will not speculate about possible defenses the Employer might have put forward. The point is, Objection 7 did not give the clear notice the Employer needed in order to have the opportunity to prepare its defense.

The dissent also accuses us of excessive solicitude for the Employer's due process rights. We disagree that our concern is excessive. Due process is a fundamental right, which we are obligated to protect. Our decision also accords with the settled principles that "[r]epresentation elections are not lightly set aside" and that "the burden of proof on [objecting] parties is a heavy one." *Safeway, Inc.*, 338 NLRB 525 (2002) (internal quotations omitted). Given these principles, it also follows that elections should not be set aside unless the nonobjecting party has received clear notice to allow it to properly defend its allegedly objectionable conduct. For the reasons explained above, the Employer did not receive such notice here.

[8] See *Precision Products Group*, 319 NLRB 640, 640–641 (1995) (overruling election objection on due process grounds where the nonobjecting party was affirmatively misled as to the relevant issues at stake).

the facially coercive and discriminatory preelection conduct found by the hearing officer. Instead, the majority denies employees their statutory right to a fair election on the basis of a newly-fashioned "red herring" theory of due process which rewards the Employer for its inability to present an effective merits defense. Accordingly, I dissent.

The hearing officer recommended sustaining Objection 7 on the basis of the following findings: (1) the Employer's labor consultant told 15–20 employees, while they were "on the clock" at a captive audience meeting held at the Employer's offices 2 weeks before the election, that they were not to stop to talk to union representatives on the street outside; and (2) after this meeting the Employer's security guards escorted the employees as they walked the several blocks from the offices back to the store where the employees worked. The hearing officer found that, by its instruction at the meeting, the Employer promulgated an overly broad no-talking rule and that, by the security escort, the Employer enforced this rule and engaged in surveillance of its employees' protected concerted activity. He therefore recommended that Objection 7 be sustained.

In its exceptions, the Employer argues that it was deprived of due process because Objection 7 referred to objectionable conduct affecting "off-duty" employees, whereas the hearing officer found conduct affecting employees who were "on the clock." Even assuming that the objectionable conduct found differed from the objectionable conduct alleged, the Employer's due process defense fails because it is well settled that in objections cases, the hearing officer may consider issues that "do not exactly coincide with the precise wording of the objections" if those issues are "reasonably encompassed within the scope of" the objections set for hearing, *Precision Products Group*, 319 NLRB 640, 641 fn. 3 (1995), and are fully litigated, e.g., *Pacific Beach Hotel*, 342 NLRB 372, 373 (2004). Here, both elements of this standard are satisfied.

First, the hearing officer's recommendation was based on findings that were reasonably encompassed within the scope of Objection 7. Both the instruction at the meeting and the security escort were elements of a single course of conduct whereby the Employer prevented its employees at the meeting from talking to union representatives—precisely as alleged by Objection 7. The instruction constituted a verbal directive to the employees that they were not to talk to union representatives; this directive was enforced by the security escort. The instruction and escort together prevented employees from talking to union representatives, just as the Petitioner alleged in Objection 7.

The only way in which the objectionable conduct found by the hearing officer even arguably varied from that alleged in the objection is that the conduct affected employees who were not expressly found to be "off duty." In this context, however, the question of whether the employees were on or off duty is of no legal significance. The Employer's prevention of employee contact with union representatives was objectionable because it singled out union-related activity for prohibition. *Montgomery Ward*, 269 NLRB 598, 599 (1984). The Employer's conduct was impermissible whether or not the affected employees were on or off duty. Id. The Employer's decision to litigate the sole legally immaterial fact alleged in Objection 7 cannot and does not alter the reality that the Petitioner *alleged* that the Employer prevented employees from talking to union representatives, and the Petitioner *proved* that the Employer prevented employees from talking to union representatives. Thus, the factual circumstances found were not merely "reasonably encompassed" within the scope of Objection 7's allegations, *Precision Products*, supra, they were materially identical to them.[1]

Second, the issue of the instruction at the meeting was fully litigated. At the hearing, the Petitioner's witnesses testified on direct examination that they were instructed at the meeting not to talk to union representatives. The hearing officer signaled that he viewed the instruction at the meeting as a relevant fact by questioning the Petitioner's witnesses regarding the number of employees who were present at the meeting. Moreover, the Employer's conduct at the hearing indicated that it understood that its actions at the meeting were at issue: the Employer made no objection to the relevance of the testimony regarding the instruction; it sought to establish that the employees at the meeting were being paid for their time; and it offered evidence that it provided the security escort because employees present at the meeting opposed to union representation were concerned for their safety.

The majority contends that to direct a second election on the basis of the conduct found objectionable by the hearing officer would violate the Employer's right to due process. The only specific ground my colleagues offer for this contention is their newly-fashioned "red herring" theory, i.e., that Objection 7's characterization of the

[1] Although the "reasonably encompassed" standard of *Precision Products* is applicable here, the particular facts of *Precision Products* are clearly distinguishable from those of the instant case. In *Precision Products*, the Board found that a nonobjecting party had been denied due process because the hearing officer recommended setting aside an election on the basis of conduct alleged in an objection that had been specifically withdrawn prior to hearing. 319 NLRB at 641 fn. 3.

employees at issue as "off duty" misled the Employer into presenting the irrelevant defense that the employees were actually "on the clock."[2] However, the Employer has not made this argument in its exceptions brief or at any other stage of these proceedings. Thus, the majority appears to be more solicitous of the Employer's due process rights than is the Employer itself. Rather than allow the Employer to suffer the usual consequences of failing to present a sufficient defense on the merits, the majority puts the onus on the Petitioner for "misleading" the Employer. The majority cites no case, however, for the proposition that the inclusion of an irrelevant inaccuracy in an objecting party's allegations absolves the nonobjecting party from defending on the merits as to the material facts alleged.

Unlike my colleagues, I would not allow the Employer to avoid the consequences of its preelection misconduct simply by pointing to a legally irrelevant inaccuracy in the pleadings. The majority ignores the basic principle that procedural due process requires that the defending party be afforded *reasonable* notice of the charges against it.[3] The mere inclusion of the phrase "off duty" in the language of Objection 7 was not so misleading as to deprive the Employer of reasonable notice of the grounds on which its conduct interfered with its employees' representational rights. As explained above, Objection 7 alleged that employees were prevented from talking to union representatives, and that is precisely what the evidence shows. Moreover, the Employer asserts that the purported defect in the wording of Objection 7 deprived it of due process without giving any indication of what alternative defenses it might have presented had the objection lacked this defect, or what evidence it might have used to support any such defense.[4] The Employer's reticence on this point does not, however, deter my colleagues from inferring a fatal defect in the wording of Objection 7 from the Employer's flawed conduct of the litigation. To uphold the Employer's due process defense in these circumstances rewards it for its unreasonable and unexcused failure to present an effective merits defense.

Finally, the majority's assumption that an absence of sufficient notice may be justly inferred from the absence of a colorable defense is not only bad logic, it is simply inapplicable to the circumstances of this case. The record of the hearing shows that the Employer *did* in fact offer a viable defense to its conduct at the meeting. The Employer put on witnesses who testified that the Employer provided the security escort in order to protect from violence employees at the meeting who were opposed to union representation, an argument that the Employer renewed in its exceptions. The hearing officer discredited this testimony, but, had it been credited, it might have been one circumstance that could have helped justify the instruction at the meeting as well as the provision of a security escort.

For all of the above reasons, I would reject the Employer's "due process" defense and adopt the hearing officer's recommendation to sustain Objection 7.

Dated, Washington, D.C. July 31, 2006

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

[2] The majority observes in passing that the hearing officer additionally found that the Employer engaged in surveillance, which, the majority states, "was not alleged as an objection at all." I disagree. The objection did not use the term "surveillance," but, as explained above, the objection's allegation that the Employer "prevented" employee-union contact reasonably encompassed both the instruction at the meeting and the security guard escort by which the Employer enforced that instruction. Because, as the hearing officer found, the escort would have prevented such contact by monitoring any attempts by the employees to talk to the union representatives on the street, the hearing officer's legal conclusion that the Employer thereby engaged in surveillance conforms to the language of the objection.

[3] See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

[4] Compare *J. K. Pulley Co.*, 338 NLRB 1152, 1153 (2003), where the Board upheld a due process defense in a representation case when, in its exceptions brief, the Employer proffered the evidence that it could have used to defend against the unalleged grounds for a ballot challenge that was sustained by the hearing officer.